No. 02-675

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Petitioners,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. D/B/A COMMACK KOSHER, BRIAN YARMEISH, AND JEFFREY YARMEISH,

Plaintiffs-Respondents,

and

RABBI LUZER WEISS, AS DIRECTOR OF THE KOSHER LAW ENFORCEMENT DIVISION OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendant-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

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SHELDON SILVER, *ET AL.*,

Petitioners,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC., *ET AL.*,

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PETITIONERS' REPLY MEMORANDUM

I

THE NEW YORK LAW PROHIBITS INTENTIONAL COMMERCIAL FRAUD AND DOES NOT DENY ANYONE'S FREEDOM OF RELIGION

In declaring extravagantly that New York's consumer fraud law "den[ies] non-orthodox Jews . . . the freedom to practice their religion" (Br. in Opp. 2; see also Br. in Opp. 10-11, 16) and in postulating a number of extreme hypothetical analogies (Br. in Opp. 5, 12), the respondents ignore the limited reach of New York's law. It affects *only*

vendors of food. And it regulates their conduct *only* if they choose to exploit the word "kosher" in selling their products. And it regulates *only* deliberate misuse of that term by vendors who *know* that what they are selling does not satisfy the standard defined in the statute. None of these limitations apply to the "Catholic communion" hypothetical on which the respondents repeatedly rely.

Non-Orthodox Jews are entirely free under the New York law to sell, buy, or eat food that is kosher (or not kosher) by any standard. But both Orthodox and non-Orthodox Jews are prohibited from representing food as "kosher" (and thereby selling it at high prices) when they know that the food does not qualify by the standard that the term "kosher" has conveyed for centuries. This statutory restriction limits no person's freedom of religion, but it effectively protects the consumer who is seeking to purchase food that is truly "kosher."

The respondents' claims that the word "kosher" has "gone through a metamorphosis" (Br. in Opp. 15) and that the consensus expressed in affidavits of Conservative, Reform and Reconstructionist rabbis submitted ten years ago regarding the meaning of the term is now obsolete (Br. in Opp. 17) are factually unsound and are, in any event, not constitutional grounds to invalidate a statute that has been on the books in New York for more than 85 years and has been copied in many other jurisdictions. A State may protect consumers who understand "kosher" to mean what it meant ten years ago.

Finally, there is no significance to the fact that this Court denied certiorari in *Ran-Dav's Country Kosher, Inc. v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993). The New Jersey statute that was challenged in the *Ran-Dav's* case had no "intent to

defraud" requirement, so that even good-faith errors were subject to the law. Moreover, the Attorney General of New Jersey did *not* seek this Court's review of that decision. Only the private intervenors petitioned for a writ of certiorari. In the present case, the State of New York, through its Attorney General, has also filed a petition for a writ of certiorari.

II

THE RELIGION CLAUSE DOES NOT PROTECT DELIBERATE DECEPTION FOR MONETARY GAIN

In *Ryan v. Telemarketing Associates, Inc.*, No. 01-1806, this Court is currently considering the applicability of the First Amendment's Free Speech Clause to fraud by a fundraiser for charity. The *amicus curiae* brief of the Solicitor General in that case declares, in terms that apply to this case (pp. 6-7):

> The First Amendment does not preclude the government from prohibiting fraud or prosecuting those who intentionally deceive others for monetary gain. Intentional lies distort, rather than contribute to, the marketplace of ideas, and any value they have is outweighed by society's interest in protecting those harmed by deception. It has therefore been settled, for more than 60 years, that those who extract money through fraudulent misrepresentations are not shielded by the First Amendment – even though their misrepresentations are speech and even if

they solicit in the name of charitable causes. See, *e.g., Schneider v. State*, 308 U.S. 147, 164 (1939).

The court below invalidated a New York law that protects consumers against deliberate fraud on the ground that the Establishment Clause shields vendors who engage in such fraud when the subject is religious observance. The same considerations that led this Court to grant certiorari and to consider *Ryan v. Telemarketing Associates, Inc.*, No. 01-1806, which involves fraud in the area of constitutionally protected speech, warrant plenary review of the decision of the Second Circuit in this case.

CONCLUSION

For the foregoing reasons and those presented in our Petition and in the companion Petition in No. 02-672, a Writ of Certiorari should be granted.

Respectfully submitted,

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